



Home-based Working in the UK Committee

Corrected oral evidence

Monday 30 June 2025

3.15 pm

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Members present: Baroness Scott of Needham Market (The Chair); Lord Farmer; Baroness Featherstone; Lord Fink; Baroness Freeman of Steventon; Baroness Manzoor; Baroness Nye; Lord Parker of Minsmere; Lord Stevenson of Balmacara; Baroness Watkins of Tavistock.

Evidence Session No. 24

Heard in Public

Questions 240 - 249

Witnesses

I: Kirsty Watt, Director of Strategy and External Affairs, ACAS; Stephen Ratcliffe, Partner, Baker McKenzie; Tania Goodman, Partner and Head of Employment, Collyer Bristow.

Examination of witnesses

Kirsty Watt, Stephen Ratcliffe and Tania Goodman.

Q240 **The Chair:** Good afternoon, everybody, and welcome to the second session this afternoon of the House of Lords Select Committee on Home-based Working. I warmly welcome our witnesses, who will introduce themselves in a moment.

This session is being broadcast, and you will receive a transcript in due course, which you can check for any errors. Please feel free to answer any of the questions. Some of them will be directed at one of you specifically but if you feel that you want to add anything, please feel free to come in. If you think of anything else after you have left, please feel free to write to us. Lord Farmer has the first question.

Lord Farmer: Welcome to the committee. The first question is primarily for Kirsty Watt. What is the role of ACAS in improving industrial relations, and how is it involved with remote and hybrid working, for example, through its code of practice on flexible working?

Kirsty Watt: Thank you for inviting me. I am director of strategy and external affairs at ACAS. We have a duty to promote industrial relations in Great Britain and, within that, we also have a duty to provide conciliation services. We are about getting upstream of cases that might come into the tribunal system, providing early conflict support, preventing disputes and, obviously, preventing tribunals.

When it comes specifically to home working, we have the code of practice on flexible working. It is much broader, because that is where there was the regulatory change to provide that code, but the code covers a multitude of varieties of flexible working, of which one is home working, remote working and its various forms.

By way of introduction, it is important to say that we are not seeing a lot of cases relating to remote home working coming through the dispute resolution system. We see a very small number of cases relating to flexible working—less than 1% of the cases we see, and a tiny minority of that will be related to remote and home working. I preface our role with the fact that we very much focus on flexible working and conflict prevention before we reach the stage of dispute, but when we get to that dispute stage, we are not seeing huge shifts coming through yet.

Lord Farmer: For hybrid and remote working to be workable from day one, how would you advise the Government to structure and implement the Employment Rights Bill? Should unfair dismissal protection from day one be in the future consultation?

Kirsty Watt: As you are probably aware, because we are a non-departmental public body independent from Government, I will not comment on government policy matters for Parliament. As ever, what ACAS does is provide the practical implementation. Whatever regulatory

reform is coming through, we are always looking to ask whether we can make it practical, reasonable and implementable. Can we make sure that the people of Britain have the skills and knowledge they need to have quality conversations? It all boils down to whether you can bring together the employer and the employee to have a reasonable conversation. We provide a framework through which to get to an agreement about that reasonableness.

Lord Farmer: That is a good answer, thank you.

Q241 **Baroness Freeman of Steventon:** We have heard and we know that employers and employees have different priorities and attitudes to working in the office and working from home and remotely. Often, in a successful company, they have to interact and come to an agreement. Could each of you talk about how you have seen those interactions occur and how companies and employees become aligned? Perhaps recruitment is one of those areas where it becomes very obvious, and recruitment channels an alignment.

Stephen Ratcliffe: I am one of the partners in the employment and compensation team at the law firm Baker McKenzie here in London. As a starting point, I should say that the viewpoint of employers and employees is, of course, a very broad spectrum. I have seen practices that extend from employers who embrace hybrid working to its most extreme, such as permitting staff not only to work from home permanently but to work from anywhere—notwithstanding the immigration and tax challenges from an administration perspective that that can present. Conversely, I have seen employers taking the view that the benefits of face-to-face collaboration, cohesion and a sense that there is greater creativity in some industries require there to be much greater presence face to face and in person.

I do not think that where you sit on that philosophy is necessarily driven by your industry. It is often driven by internal management philosophy, which of course can change as management changes, which is one of the interesting aspects of what we are seeing now in respect of hybrid working.

I will always say to employers who are dealing with flexible working requests, at any stage of employment, including the recruitment stage, whether formal or informal, that it is important not to be too fixed in your position, if possible. You may have a starting point—every one of us has our own particular viewpoint on this issue—but it is important to address each request on a case-by-case basis, particularly in circumstances where you think you might say no. Part of the obligation to consult is to see whether there is a halfway house. That becomes particularly important from a legal perspective when one starts to consider some of the complexities of the law around indirect discrimination, which is a much more significant aspect of the law in respect to flexible working than the Flexible Working Regulations themselves.

The Chair: We will probably come back to that.

Tania Goodman: I head up the employment team at Collyer Bristow, a law firm based in London. It is quite important to draw a distinction between hybrid working and flexible working. They are two different things. They sound the same, but they are not quite the same. Hybrid-working policies have been in play since Covid, and because we all had to be at home, we did not really have a choice. It was enforced on us, whether we liked it or not. Some liked it; some not so much. Then, as we drifted back into the workplace a lot of employees said, “I don’t think I need to be back in five days a week”, or even, perhaps, four days a week. In my experience with my clients, it was a gradual migration back to the office, and in some cases it has been full time—albeit not very many, I have to say. As Stephen said, some industries might require more interaction in the office, although it is not entirely industry specific. For example, if you are client-facing, such as in an estate agency and having to see people coming in to buy houses, it does not make much sense for you to be sitting at home. For obvious reasons, that might happen.

I would say that most companies have gone back to two to three days a week in the office, on average. The reason I draw a distinction between that and flexible working is because these are temporary arrangements—or so-called temporary arrangements. They are not cast in stone. They are not contractual changes, per se, although there is an argument that over time they will become implied terms of the contract, and if employees are then asked to come back more frequently, they might say, “No. I’ve been doing this now for a few years, and as far as I’m concerned, that is the default position”.

When the Employment Rights Bill comes in, it will make it even more difficult to change because it will be harder to vary the terms and conditions of employment. My sense is that some employers are looking to try to reset things a bit now before the Bill becomes law, so that they are not up against a battle of trying to change terms and conditions when it is much more difficult.

Baroness Freeman of Steventon: Are you seeing that being laid down more in recruitment advertising?

Tania Goodman: Yes, in recruitment, and also in trying to make it clear in existing terms and conditions how the land lies, to the extent that, if there is any ambiguity over what hybrid working means in practice, employers want to make sure that they are not then handcuffed into a two- or three-day-a-week arrangement in the office, which might not suit them. A flexible working request changes your contract of employment if it is acceded to; it is a permanent change. That is quite a big distinction between the two.

The Chair: Could we clarify a couple of things? If somebody makes a flexible working request, which happens to be about working from home, that would be a contractual change, whereas when employers say, “I want you in the office three days a week”, that is a sort of custom and practice; it is their choice.

Tania Goodman: Essentially, yes.

The Chair: If that situation pertains for some time, and you have been coming in two days a week, and then the employer says, “We want you back in five days”, are you saying that you think there is a point where people say, “No, we’ve done this for five years” or something?

Tania Goodman: I have not seen it in my own practice, but I can see that there is an argument that if somebody is enjoying that degree of agility—I call it agility rather than technical flexibility—they do not want to change it, so, to that extent, yes, there is a difference. Some employers will say, “We reserve the right to change the hybrid working pattern in accordance with the needs of the business”, because the needs of the business have to trump whatever anybody’s personal preferences are, subject to areas of discrimination, indirect discrimination and that sort of thing. But otherwise the employer needs a degree of flexibility to be able to adjust things as and when.

Kirsty Watt: I would probably go back to the material around flexible working, if that is helpful. There were a couple of bits of data that we got that gave a little insight on this. When we consulted in the code of practice change, we did have a more positive foreword at the beginning of that, and we got about 70%-plus saying they were comfortable and thought it was right that that foreword was a bit more positive about flexible working. So obviously there was 30%, and some of that would have been a little bit more positive, some of that might be “do not know”, some of that might be less positive. But I think roughly what we were seeing was a bit of alignment of view of employer and employee, particularly around flexibility. We did not get insight specifically on remote and hybrid, but we did get that little bit of insight on that and on some of the reasons behind that. We did some case-study literature work with a small number of companies. The biggest alignment was probably around recruitment, particularly organisations facing acute workforce challenges when there are ways to bring in that additional workforce. Obviously that is good for business and good for the other employees there, particularly if there are high demands on that business. We saw quite a bit of alignment there.

Q242 **Baroness Featherstone:** This is a question really in two parts, because we are generally familiar with our responsibilities and liabilities as employers and employees when we are at work, but what are the responsibilities and liabilities that relate to remote and hybrid working? I mean things like health and safety and well-being. Supplementary to that, what is the risk of conflict or litigation in this context? How significant is this compared to other areas of industrial relations, and what is good practice for managing it? Can I start with Tania Goodman?

Tania Goodman: Thank you. Sorry. What was the first one?

Baroness Featherstone: What responsibilities and liabilities are there that relate to hybrid and remote working—things like health and safety? We are used to those if we are employed, but not in home working.

Tania Goodman: If an employee is set up at home with a home-working station, there are health and safety responsibilities for the employer to make sure that that station and that set-up comply with health and safety laws, to make sure that there is going to be no risk of any sort of injury or any problematic areas around that. It would also extend to having robust IT policies and data protection, because obviously when one is working from home you do not have the same layers of protection as you would do in an office. Even though most of our work now is online rather than paper-based, nevertheless you need to make sure that you have got your system set up in such a way that there is not going to be an infiltration.

Baroness Featherstone: Is that written down somewhere? Are there actual guidelines yet in terms of responsibilities?

Tania Goodman: The Health and Safety Act contains requirements along those lines.

Baroness Featherstone: At work?

Tania Goodman: Yes. And at work, technically, could be in the office or at home.

Baroness Featherstone: Okay. That is a clarification; thank you.

Tania Goodman: Exactly. Home working creates obligations on the employer to make sure that the employee is in a safe environment; that there are suitable IT protections; and also, I suppose, which is a more difficult thing to establish, what their mental health is like, because if you are in an office you can see if people are struggling, if they are stressed, if they are anxious. You cannot see that when they are working at home. You have to have mechanisms in place where people can check in if they are having problems, or you are checking in with them to try and make sure that their well-being is provided for.

Baroness Featherstone: In terms of risks for the company—litigation and that kind of thing—if you have not done due diligence and your employee suffers an accident or has a bad back because they had a bad chair—

Tania Goodman: There is potential liability. I would like to think that employers always do the right thing because they should do the right thing, and many do. Some need a bit of encouragement, and that is one reason. Yes, there are potential liabilities if health and safety checks are not done. I think it is harder with mental health to establish what is going on. Invariably in employment law, mental health has become a much bigger issue than it ever was, and it is quite hard to identify sometimes exactly what the nub of that is. It is really evidence-based, I suppose.

Q243 **Baroness Freeman of Steventon:** Can I just ask a quick supplementary on that? When you said it is the responsibility of the employer to know that the workplace is safe, if that workplace is somebody's bedroom, is the employer supposed to be able to enter your

bedroom and check your set-up? Or is it down to the employee to assess their workstation, just as, if I were out doing remote work in a field, I would be expected to be able to do an assessment?

Tania Goodman: There is an element of responsibility on the employee as well. It would be very intrusive for your IT department to come around to your house and start investigating. Having said that, it is not unheard of; if somebody has problems and they need to reconfigure the set-up, that would be proportionate. I think in most cases it probably is not. Maybe you are on a Teams call and they can see your set-up and ask you questions, and you fill out a questionnaire, so you have the checks and balances in place. But clearly, during Covid, a lot of people were sitting on the end of their beds with their laptops on their knee and who knows what problems that caused, but I am not aware of any litigation on it as such.

Kirsty Watt: Most of our information here is around procedural rights and responsibilities with regard to implementing the code. The first thing to say on that is that we think people are reasonably comfortable and confident with their responsibilities, and obviously that reduces the potential of conflict. We did a YouGov poll and we got between 79% and 90% of employers saying that they were fairly or very confident implementing the measures on flexible working. That really just looks at the procedural matters. Within those procedural matters, they do have some responsibilities. They are obviously more minor, not in the sort of health and safety domain, but they are around things like: are you meeting the employee to discuss their request? Are you carrying it out quickly enough, within the two-month window for the employer and the employee having the right to bring somebody to the discussion so that everybody knows what is going on and has clarity? Then an important one is: are you feeding back on the reasons to decline? There obviously are legitimate reasons to decline.

The code is not there to say how to run your business, but it is there to give you a framework. Then you have to say and explain. We thought that quite important in building long-term trust. We did ask whether people felt comfortable about providing an explanation on their reason to decline and we are getting, so far, reasonably positive results around that. Then those probably would be the elements of best practice that we have captured in the code as well.

Stephen Ratcliffe: I echo what has already been said. I would emphasise the point Tania made about mental health and the importance of proactive management in a home-working context, to a much greater degree, perhaps, than is necessary in a face-to-face context. I have unfortunately had a number of pieces of litigation arising out of some very sad circumstances where individuals were very isolated during lockdown and became quite unwell as a result. That is no criticism of the managers concerned, but we all know—those of us who managed people during lockdown—the efforts we had to go to to ensure that we were communicating twice as much as perhaps we would if we were in the office dealing with people face to face, if necessary on Zoom or Teams to

ensure that everyone was doing okay, frankly. I think that is still the case even in a hybrid working set-up.

In terms of risk, those companies who are engaging individuals to work anywhere they like, any time they like, give rise to a lot of questions for me, as someone who advises not just on domestic law but on broader, multi-jurisdictional issues, particularly: are you tracking where they are? Have you thought about where you might need to pay taxes? Do they have a visa to be where they are? I have seen some unfortunate episodes of things going wrong. I have also, conversely, seen some unfortunate episodes of things going wrong where individuals have moved to a different country and not told their employer. That gives a different set of challenges, of course, and is less prevalent now post lockdown. None the less, those are potential risk factors.

When it comes to litigation, again, I appreciate that the statistics suggest that claims related to flexible working are a relatively small proportion of the tribunal case load. I have seen quite a few. That is because the flexible working request that is made by some employees can be almost an existential question: "I cannot do this role under the requirements that are being placed on me because of my responsibilities outside of work, or because of the disability from which I suffer". That is why I mentioned the need to be somewhat flexible, and certainly to take each case as it comes, because there are some very deserving circumstances—some perhaps less so—in which a rigorous, inflexible approach can lead to employees simply not being able to continue in their roles any more. That is where litigation tends to arise.

Baroness Freeman of Steventon: Can I just ask you a very quick follow-up question? You mentioned employees moving. Where is the onus between the employer and the employee to know where the employee is working from? Should the employee notify the employer if they move house, say, even if it is in the same country, because their set-up will have changed, or should the employer constantly check where the employee is working from?

Stephen Ratcliffe: For a host of reasons, it is important for the employee to communicate to the employer where they are moving to, even if they are simply moving house in the same country. The bigger issue arises when you cross borders. It becomes quite important to track where individuals are and for how long they are in certain jurisdictions, because presence in a particular jurisdiction can give rise to obligations on the employer. First and foremost, there is corporate tax: somebody moving jurisdiction to work in a different jurisdiction can give rise to a permanent establishment for corporate tax purposes in another country, meaning that the employer is subject to corporation taxes in that country, which can be quite a significant burden. That tends to be the most significant issue. In my list of questions, that is question number one.

The next one is immigration. If it is simply illegal—criminal—to work in a particular jurisdiction without a visa, then that is a big problem. It may

be a big problem for the employer because they may have an entity that already has some sort of sponsorship licence to get visas, which they may lose because they have somebody working there unlawfully. It may be a major problem for the employee, because there are some jurisdictions where there is corporal punishment for illegal working. That is a significant issue.

The next one on my list is employment tax and social security: who has the obligation to track the employee and deduct and pay over the appropriate tax and social security? In the UK, very broadly, employers are subject to PAYE, so they have the primary obligation to deduct and pay the tax. If the employee is in the UK and the employer does not know, that does not necessarily absolve the employer of the obligation and can give rise to interest and penalties.

Fourthly and finally on my list of questions is employment laws. If you are going to work in Timbuktu, you are very likely to get employment rights in Timbuktu. Even if your contract says that you are subject to English law, most commonly, your presence working in a particular jurisdiction will give rise to an obligation to comply with that location's laws, at least after a certain point in time. One of the biggest challenges for employers is that it is complex enough adhering to English law. If you also have to adhere to the law of every other jurisdiction in the world at the same time, because you do not know where people are, that is impossible.

Baroness Freeman of Steventon: So the employee has a responsibility to tell the employer, but the employer should also be asking.

Stephen Ratcliffe: Absolutely. I can give you some fun examples of how individuals have moved jurisdiction and employers have found out, particularly during lockdown, which gave rise to challenges.

Baroness Freeman of Steventon: Is an insurance industry growing up around this?

Stephen Ratcliffe: If I might jump in on that one: if there is not, there should be. It is quite common for employers to specify in home-working contracts that employees must ensure that their house insurance covers the property that they have from the employer. Well-drafted contracts for those who are working from home—even partially working from home—will extend to that and, as we discussed previously, to the right, if absolutely necessary, for the employer to gain access to the premises in order to ensure that health and safety obligations are being adhered to.

Q244 **Baroness Manzoor:** Thank you very much for attending this session to give evidence today. Can you say how the prevalence and nature of remote and hybrid working varies across different sectors? Is there a risk of conflict between those who can work in a hybrid fashion and those who cannot and have to be office-based? What are the risks associated with the employer and the employees in relation to this?

The Chair: Let us start with you, Kirsty. We read that this is becoming a

source of conflict in some organisations. What is your perspective?

Kirsty Watt: I would go back to the data that we have on disputes: it is not showing up in that very significant way in the dispute resolution data. We do not have data on the actual prevalence across GB, so we do not measure and track how many people are at home and remote working. What we do is look at our case data coming through for dispute resolution and at our helpline data, and then we ask ourselves: what trends are presenting themselves in that data? Then we look at things such as the website, which will give us a bit of soft intelligence. We saw a doubling of inquiries around flexible working, but again, very small numbers came through. Again, that points at flex rather than it necessarily being home working.

We then looked at some more qualitative research with a number of larger organisations to look at whether they have some employees in a different position and at the employer perspective. Through that case-study research, which was quite a limited evidence base, we saw that there are differences in different sectors. For example, with retail, people out in the stores obviously need to be in the stores but people in head office may not need to be in the store. There may be some tension around that. We had a local government case study where they wanted to create a policy for the head office staff, but they were concerned about the impact that announcing that policy would have if it could not be implemented to all staff.

In mitigation of that, we have seen some other solutions, so it is not always either hybrid or home working, or having no flexibility. For example, an employer might say, "We can't offer you home working because we need your interface with our customers, but we can look at term-time working, an early start, an early finish, or other forms of flexible working". That is where the bigger picture comes in, so that we do not see an "us and them" culture between people being offered remote and hybrid and those who are not. Some organisations look at our flexible working policy and then at how they adapt that to those who need to be with customers, those who need to be on a telephone or a helpline, those who need to be accessible at different points of the day, and those who can have different types of flexibility about where they are physically.

So we do not have anything on the prevalence, but we have a little bit of case-study research showing potential issues. They are not yet coming through to dispute, but we think and hope that there are some risk mitigation strategies around that.

Q245 Baroness Watkins of Tavistock: Could I ask a supplementary? We heard from NHS Employers about the fact that about 1.5% of employees can have some hybrid working and the rest have to go to work. Are you beginning to see tension through ACAS about remuneration compared with those who have the cost of travelling every day, or has that not emerged?

Kirsty Watt: No data has appeared to me yet, but that is not to say that we do not have any data. If we probed a bit further, then pay is obviously our biggest issue presenting in disputes. Where we might see that come through is in collective cases; I have had a look at that and we have not had any of evidence come through yet.

Tania Goodman: On a practical level, dealing with employers and companies, I have seen tensions along those lines. Some companies have had slightly different hybrid working models for, say, professionals versus administrative staff and that sort of thing. It has not always gone down well. There is a sense that being collegiate is everybody being in the office at least three days a week or whatever it may be, and once you start differentiating between groups, for whatever reason, it does not always land that well. You tend to find, for the people who are in the least, that others tend to adopt that model, thinking, "If they're only in two days a week, I think I'll only come in two days a week". It has a knock-on effect psychologically.

On pay, I have also heard from clients that lower-paid staff in the chain are not happy that, for example, their travelcards are going to cost them exponentially more to come in three days a week than two days a week. There was never an issue about pay for travel to work—it was always baked in—but I have heard it is become becoming more of an issue now.

Baroness Manzoor: Can I turn that around the other way? You may have people working at home whose office is in London, let us say, and they are based in the north. As you said, travel used to be baked into salary—you chose where you went to work—but there are now elements where some people are coming back and apportioning the travel as expenses to come into the office for maybe two days a week. Are you beginning to see that? Are there concerns for employers that this happens? There are only a few examples at the moment, and they are scattered, but I am just wondering whether you have seen a greater picture.

Tania Goodman: I act for employees and employers, so I see it from both sides, but I suppose I act more for employers. Where those requests have been coming in, they have been reluctant to agree to them because, once you agree to some, where do you draw the line? To Stephen's point about people moving away without telling the companies, it is your choice to move a not very commutable distance away from the office. That does not change the contractual core hours when you are supposed to be in the office, whether it is hybrid working, flexible working or whatever it may be. I do not think employers are terribly keen to move the dial on that unless they are having problems recruiting. Under those circumstances, they might have to offer it as some sort of incentive.

Stephen Ratcliffe: To follow up on that last point, there is a potential tax issue if you are attempting to expense travel to what is ultimately your primary place of work. To the extent that individuals are seeking to claim it as a tax-deductible expense, that is questionable. That has been

a particular issue in the context of those who are self-employed: being able to expense your travel in a way that employees are not is, potentially, one of the benefits of being self-employed. I just wanted to clarify that, in so far as that is being done.

On the conflict or tension, I completely support what has already been said. I have a couple of other points. First, I have noticed one other mild area of tension—and it is mild—which is the distinction between those in the workforce who are potentially at the stage of their career where they are still learning and those who are not. Where employers have sought to delineate between those who are learning and therefore need to be here, listening to everybody do their job, and others who perhaps do not have to be here quite so much, there is a common response: “Who can I listen to if nobody else is here?” I think that is not unreasonable. There is also a similar tension sometimes—again, to a limited degree—around the distinction between those with and without childcare commitments. If I take a couple of hours off in the evening to put my kids to bed and have a colleague waiting on me, then, frankly, I understand both sides of that equation.

The final thing I would say about conflict is a sort of practical point, which arises from the way in which the Flexible Working Regulations work and the ACAS guidance on them. There is a piece of guidance in the code on flexible working which states that the person who makes the decision on a flexible working request should be the person who holds the meeting and who listens to the employee’s request and the reasons for it. That makes absolute sense. It is a good piece of advice. That will be the person who, in the event of a dispute, is on the witness stand giving evidence as to why they made their decision. That is absolutely correct. In larger workforces, this challenge can arise: it is tricky to apply a consistent approach from a corporate philosophy perspective when, candidly, we all bring our own particular worldview to flexible working requests. I have seen challenges where the individual with the decision-making power believes that the decision should be different from the one that was made in 10 other cases in very similar circumstances. In a sense, that is no different from this: if you have a disciplinary for something that has happened with 10 other employees in the past, HR will step in and say, “The consistent response is to do this, based on the previous nine cases”. It is no different in practice, but it is interesting that it seems to give rise to slightly greater tension than in that context, where the issue is one of hybrid or flexible work.

The Chair: Before we leave you, Stephen, we are hearing of employers who are beginning to say things such as, “We want you back in three days a week and, if you do not do that, we will cut your bonuses”. What is the legal position around using money as a lever to encourage people in, or the reverse?

Stephen Ratcliffe: In my experience, money is the most fundamental lever in the employer-employee relationship. It is perfectly lawful in principle. As Tania has explained, if your contract gives you the flexibility

to require employees to attend the office to a greater degree than they did previously, then it is lawful to do so. What you do if individuals do not is a judgment call. Some might say that the less impactful response would be to say, "We understand you may not wish to adhere to the corporate policy, and therefore we are not going to take formal action against you, but, naturally, it will impact your ability to progress in the organisation. It may impact your bonus, your promotion prospects and so on". Generally speaking, those are all matters of discretion for the employer: there is no obligation to promote people; no obligation, in many contexts, to give them a bonus, unless there is some contractual obligation to calculate one in a particular way; and no obligation to give people a pay rise. In some respects, that is a softer way of encouraging compliance. There is the harder way of encouraging compliance, which is that you are required to come into the office and, subject to your right to make a flexible working request, that is a requirement and, if you do not turn up in the office, that is treated as a matter of misconduct, just as not turning up at all is.

Q246 Lord Fink: I am interested—some of this has been touched on before—how existing legislation concerning flexible working requests currently operates in practice. Could the Government improve this, for example by investing in the employment tribunal process? I think the nub of the question is the second bit: do you have any data or information on how many people work from home following statutory flexible working requests, as opposed to making the informal arrangements with the employer that we have been talking about most of the time? What is the balance between those?

Kirsty Watt: Sadly, no, we do not have that data about how many people working at home are statutory versus informal. I would say that the reading of the runes—the dispute data—gives us reasonable levels of confidence around flexible working and the procedural aspects working reasonably well. As a person from ACAS, we would definitely not give advice to Government, but the broad issue for us, which is much bigger than this, is around getting ahead of conflict in the workplace. Our focus is whether the employer and employee can have quality conversations. We have data coming through to say that, on an individual basis, people find that very difficult, and individual conciliation cases are rising quite significantly now. The reasons for that are quite hard to unpick. One of the things that I think most observers around the workplace and society would say is that people find it difficult to agree, and our ability to disagree—the polarity—is probably increasing in society.

What can organisations and Government do? One thing is point everything in the dispute resolution system towards early resolution. Have you had a conversation with your employee before something is raised? Do you have open channels so that they feel comfortable and confident coming to you to raise something? Then, it does not get so far down the line—be it on home, remote or flexible working—that we are into a grievance situation and then a tribunal situation, and where we

then have a backlog on tribunals, which nobody wants to have. I would probably try to point the whole system at that end of the river if possible.

Tania Goodman: Most employers have not been monitoring the attendance on a hybrid working policy basis—not in my experience, anyway. There may be some soft monitoring, but it is not hard evidence. It is quite difficult to do that sometimes, unless you are monitoring door passes into buildings and things. There seems to be a reticence to do that because it gives the impression to the workforce that you do not trust them, which is not good for employment relations.

That is perhaps why there has not been too much around grievance and litigation with hybrid working policies. I have seen it where a flexible working request has been refused and then, because the employee is asking for a permanent change in their contract, it can create a conflict if the employer says no. These disputes can be quite fulsome. Anecdotally, I had a case that was due to be in the employment tribunal for 13 days—I emphasise this—over the summer on a flexible working request. Fortunately, it was settled, but the employment tribunal judge was not terribly impressed that the claim had got to a magnitude where we were going to waste public money for nearly three weeks.

Lord Farmer: This is just an idea, but do you think it is worthwhile to encourage, at the point of employment or of talking about the flexible working arrangements et cetera, some sort of training—you could call it empathy training—whereby the employer understands the concerns of the employee and the employee also understands the concerns of the employer? That training at the beginning might help facilitate an easy working relationship going onwards.

Tania Goodman: Yes, absolutely. I think it comes down to having quite—maybe robust is the wrong word—empathetic interview processes. As we know, when the Employment Rights Bill comes in, from day one, someone will have the right to bring an unfair dismissal claim, and they can already bring a flexible working request. The emphasis on recruitment is enormous for employers and, to some extent, for employees as well: they do not necessarily want to move job and find that it is not in line with their expectations. Having those meaningful conversations before you accept the role, or before it is offered, is vital.

Stephen Ratcliffe: I am all for employers getting to know their employees and every aspect of their working life personally and as a round human. I am not sure that it requires government intervention to do so but, ultimately, it is a policy decision.

Q247 **The Chair:** That brings us on to the Employment Rights Bill. I know Kirsty cannot participate in this, but one of the things that has been interesting to us as we have gone through is our broad understanding that, under the new legislation, there will be more of an onus on employers to articulate why they are turning down a flexible working request—and that could involve hybrid working, could it not? Yet we have found generally that employers are not very specific about what they like

or not about home working. That is not a criticism, just a fact. They say things like, "We just prefer people to come in", or, "We think they are more collaborative". When we ask for some sort of data, it does not appear to be forthcoming. That is for them: they are running their business.

Is that going to be an issue? To what extent do you think they will have to demonstrate a bit more than that if they are going to start turning down requests to work from home under the new Bill?

Stephen Ratcliffe: The new requirement will be to demonstrate why it is reasonable. There are two issues with that. What you and I think is reasonable may differ; if I am an employee and you are the employer who has turned me down, then it definitely differs. There is sometimes a tendency to think that incorporating the word "reasonable" in legislation avoids dispute when, in fact, the opposite is true. Much will depend on the definition of reasonableness. The existing flexible working legislation is in the Employment Rights Act, so you might assume, perhaps, that there will be a sort of band of reasonable responses test. That would be rather like with unfair dismissal, where, essentially, it does not necessarily have to be the thing that the tribunal would have done but does have to be one of the reasonable responses to the situation that an objectively reasonable employer would have taken. Alternatively, it could be something a bit closer to reasonable adjustments in the context of disability law. It will be interesting to see, and—I am sorry to say this—what will follow is years of litigation to work out what it means.

To the previous point, if you are going to build a system that creates years of litigation, you should make sure you have a judicial system that can cope. It cannot cope with what we already have. The tribunals are crumbling, literally in some cases; hearings are being cancelled at the last minute for want of judges; and hearings are taking not just months but literally years to fix. I appreciate that I am somewhat biased as an employment lawyer in saying that the system in which I work is on its knees, but, when I cannot even get somebody to pick up the phone and I am having to send somebody across town to doorstep a tribunal to get a piece of paper from them, that is a difficulty.

I digressed there for a moment. I suppose the issue that arises from that reasonableness requirement is this: if there is going to be dispute, what kind of dispute does it give rise to? The sanction currently proposed is no different from the existing sanction for failure to adhere to the Flexible Working Regulations, which is a maximum penalty of eight weeks' pay capped. I query whether that will be a sufficient incentive, particularly given the delays in potentially getting to a judgment for an individual who feels they have been treated unreasonably to pursue that claim. I add that, in practice, I am concerned to hear that there are employers not giving sufficient reasons for their desire to have in-office working. Because of the indirect discrimination issue, which I am sure we will come on to, that gives rise to a degree of legal exposure because of the potential necessity to objectively justify your decision not to permit the flexible working. It is already good practice to explain why you cannot do

the thing the employee has asked you to do and why you have really quite a good reason for it.

Tania Goodman: I do not see a huge change under the Bill from where we are at the moment on flexible working. Emphasis has changed slightly: it seems to be that the default position should be that the employer should try to embrace the change wherever possible, unless there is a very good reason not to. I sort of understood that that was the case anyway; there may be a greater emphasis on trying to make it work. The eight prescribed reasons why you can refuse the request remain exactly the same. I have read that there may be some element of having to produce some sort of evidence or something that is more tangible than saying, "We just do not think it will work". Where somebody wants three days a week but you need somebody in five days a week, say, there perhaps might be a cost issue in recruiting an extra person to cover the degree of flexibility, and then you could justify it. It is evidentially going to be harder to do that when somebody wants a hybrid working pattern but they are still prepared to work, say, on a full-time basis. What is the hard evidence to substantiate the fact that they will not be as productive or collaborative, unless their work is measured in hours or financial performance? Then you could, I suppose, but otherwise it will be very difficult to expect that evidence to be forthcoming.

I also endorse what Stephen said about the tribunals. I am sorry, but—not to sound overly critical—the backlog is massive, and that is before the Bill comes into force. I think we are all bracing ourselves for what comes next.

Baroness Freeman of Steventon: Can I just pick up on that comment about indirect discrimination? I hope this is the right time to. We are hearing a lot on hybrid and remote working about fairness and equality and how that pans out. I wondered if you could give us the sense, from the legal perspective, of where that comes in, for example if I do not get access to events being held in the office because I am a remote worker, or the other way around, where I am being denied hybrid working but I am a carer. Where do these intersect, and what is the legal position on all of this—equality to access to workplaces and benefits and equity of salary?

Stephen Ratcliffe: It comes up in in two contexts in particular, although there are others: disability—the employee's disability, as opposed to somebody else's, typically—and caring responsibilities. Those give rise, in principle, to potential indirect disability and/or indirect sex discrimination claims. To explain what I mean by that, indirect discrimination is where you apply a provision, criterion or practice—a PCP—to a group of people and it essentially disadvantages those with a particular protected characteristic such as men, women, people of a certain age group or ethnicity, and that PCP is not objectively justified. To take a silly example, if my employer says that everyone over 6 foot is getting a bonus, then I am not getting a bonus—but, statistically, women are less

likely to get a bonus; therefore, that is indirect sex discrimination unless it can be objectively justified.

What is interesting about that example, following a European court case called CHEZ, is that, even though that practice of giving bonuses to those over six feet really indirectly discriminates against women, I can bring the claim as a man. The reason for that is because I suffer the same disadvantage as the protected group: I am also not over six feet.

That gives rise to some interesting issues in the flexible working space in particular. For example, if an employer has a policy that employees cannot work part-time, that is very likely to give rise to indirect sex discrimination requiring objective justification. The reason for that is because it has been confirmed a number of times, including most recently in 2021, that tribunals can take judicial notice of the fact that the greater burden of childcare statistically still falls on women in this country, and therefore an absolute bar on part-time working potentially disadvantages women to a great extent than men.

In respect of hybrid working, however, the position is not quite so clear. If you require people to come to the office, that naturally requires a degree of commuting, so the argument could run that women have the greater burden of childcare and, therefore, a requirement to come to the office however many days a week disadvantages women because they are less able to do the commute. There was an interesting case four months ago called Perkins, in which the Employment Appeal Tribunal said that that was almost a leap too far. The tribunal needs to consider it can take judicial notice of the fact that women have greater caring responsibilities but, in each individual case, it needs to consider whether the PCP disadvantages that particular protected group. For example, if you were to say to employees that they have to be in the office five days a week but somebody comes to you and says, "I need to drop off the kids in the morning at school", and the employer says, "Okay, that is fine. You can come in from 10 am", then, potentially, that PCP may not disadvantage women. I am not saying it would or would not—it depends on facts—but, in theory, it may not. You can see that come up a lot in caring situations where judicial notice is taken of the greater burden of caring responsibilities, for children and others, falling on women.

It can also arise in the disability context: where somebody is disabled, there are a number of potential claims, one being the reasonable adjustments claim I just mentioned, and another being the same kind of indirect discrimination claim: "The policy of requiring me to come to the office puts me at a disadvantage because there is something about my disability that makes that harder or impossible and requires objective justification". Sorry for the very lengthy exposition.

Q248 Baroness Watkins of Tavistock: Can I just come in there? I have been talking to people who have had a kind of reverse scenario, particularly young people in straitened family circumstances. They have said, "I want to come to the office for five days. You have reduced the office space, and now it is very difficult for me to come for more than three because I

cannot get a desk". Have you got any comment on that for somebody who was originally employed in an office-based job which, before Covid, was five days a week?

Stephen Ratcliffe: I am hugely sympathetic to anybody in those circumstances. I also recall the examples of people typing on their ironing board during lockdown. It was awful. An employer might offer a range of kinds of support in those circumstances. I have seen, for example, permitting people to come to the office more than the mandatory certain number of days and making sure that person has priority for a desk; allowing people to use Regus offices, WeWork or equivalent; and providing home-working support such as the desk, chair, monitor and keyboard so that it is a bit more palatable. That is the practical response. From a technical position, it gives rise to some interesting questions. Straitened financial circumstances are not, at present, a protected characteristic. If one were to try to raise a legal claim on that basis, one would have to identify a particular protected category which is impacted to a greater degree by that. That might be youth, for example—it might be young people in particular, in theory. I am not going to comment on whether that would fly. That is just the route by which one would have to pursue it legally.

Baroness Watkins of Tavistock: If you were a young care leaver, for example, there might be a protected characteristic within that kind of structure that employers might have to be thoughtful about.

Tania Goodman: Yes, if you have a caring responsibility, maybe it would be associative discrimination.

Stephen Ratcliffe: I will explain the challenge with associative indirect discrimination. I mentioned the CHEZ case and the idea that one can bring a case of indirect discrimination even though one is not in the protected category, such as me bringing the indirect sex discrimination. That is often referred to as associative indirect discrimination. It is a very confusing term and probably an inappropriate one: if you look at Section 19A of the Equality Act, which is where that concept sits, it does not talk about association. Technically, you need have no association whatever with the disadvantaged group or people; you simply have to suffer substantially the same disadvantage. I suppose the care leaver—care leaving not being a protected characteristic in itself—would have to argue that either they were in a protected characteristic which was disadvantaged or they suffered substantially the same disadvantage as another group, such as disabled people potentially, who might be more likely to be in receipt of benefits and thereby in straitened financial circumstances. Again, I am being somewhat creative in trying to come up with a legal route, to be honest.

Baroness Watkins of Tavistock: Thank you. I think we might see some more of that as time goes on.

Q249 **Baroness Freeman of Steventon:** I have one quick follow-up. I am sorry to pursue this, but I think it is important. If employers are

essentially paying those who have hybrid working patterns less because they see that as a benefit to them, would that come under discrimination because there might be more people who are requesting and needing hybrid working because of their protected characteristics of being disabled or in a carer role?

Stephen Ratcliffe: This gets really quite complex. It first depends on the type of discrimination. In the sex discrimination world, if you are complaining about your pay or any contractual term, you are in the sphere of equal pay. Taking that example to begin with, the way the argument would run is the home working-based individual would say, "I can identify a comparator in equal work who is paid more, and they are of the opposite sex". It is then for the employer to give a material factor—a reason for the difference in pay that is not sex. If that difference is indirectly discriminatory, reliance on that factor then requires objective justification. You almost end up in the same position if you are saying home working is the reason. If home working is more prevalent among women, for example, then it gives rise to the same objective justification issue. Interestingly, men can still bring that claim, potentially because they can piggyback on the female claim and say, "If she's entitled to the same term, I am entitled to the same term". I am sorry: I am going off on a tangent again.

Outside of sex discrimination, although it is subject to consultation whether that equal pay concept will be extended to race and disability right now, other aspects of other protected characteristics would require you in that context to bring a straight direct discrimination or indirect discrimination claim. The direct discrimination claim would be that I am paid less for working at home because I am male, female, a certain ethnicity, a certain age and so on, which I imagine would be hard to make out. You do not have to prove discrimination—you just have to prove facts from which discrimination could be inferred—but, even so, I would be surprised if that were made out in most cases. There is also the indirect discrimination argument, which would be that my particular protected characteristic is represented to a greater degree among home workers, therefore paying home workers less is indirectly discriminatory and the employer would be required to objectively justify. I think that that would be the analysis.

The Chair: My goodness. It does not sound as though Stephen and Tania will be out of a job any time soon. There is such a lot going on in this space, and it is remarkably complex. Thank you for sharing these insights with us. I thought the written evidence from ACAS was particularly strong, so thank you for that. I thank all three of you very much indeed for coming to talk to us this afternoon. I will bring the session to a close.